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STATUTORY LIMITATION OF CRIMES UNDER INTERNATIONAL LAW: LESSONS TAKEN FROM THE PROSECUTION OF NAZI CRIMINALS IN GERMANY AFTER 1945 AND THE NEW "DEMJANJUK CASE LAW"¹

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Abstract. Taken from the historical perspective, the article primarily examines the issue of (non-) applicability of statutes of limitation to crimes under international law, both from the perspective of the international and national law. Speaking in more detail, this paper looks at the lengthy and variable process of dealing with Nazi criminals after the WWII. It focuses especially on the prosecution of Nazi criminals in (West) Germany, which strictly adhered to application of laws of domestic provenance. Thus, among other principal challenges, the prosecuting officers (as well as the courts and the legislators) had to deal with the issue of the statute of limitation in cases of crimes, which were (as time passed by) often perpetrated several decades earlier. This approach stood in contrast to the position of the international criminal law, which generally provides for the non-applicability of the statutory limitation to crimes under international law. This topic is still actual as we may recently observe in Germany perhaps the last attempts of the prosecuting authorities to bring the deemed perpetrators of the Nazi crimes before the courts. Not only in the well covered John Demjanjuk case we could witness an attempt of the German courts to overcome the statutory limitations through a new interpretative approach to the institute of accessory to murder under the German Criminal Code. However, this shift in the German case law has not been confirmed by higher courts yet and is sometimes also subjected to criticism by legal scholars.

Keywords: International Criminal Law, John Demjanjuk, Oskar Gröning, Reinhold Henning, Statutory Limitation of International Crimes, Nazi Crimes

Introduction

The World War II in Europe ended with the unconditional surrender of Nazi Germany on May 8, 1945.³ The year 2015 was therefore a significant milestone, marking 70 years since the end of this large-scale conflict, for commemoration of the past and reflection of some lessons taken from this still not so distant history.⁴

The passage of time is the cornerstone for this paper as well. Not only will this article try to contribute to the historical evaluation of the WW II as a triggering point for further development of the international criminal law, more specifically, it will take the matter of the passage of time as its main substantive topic.

The crimes perpetrated by the Nazis and their collaborators throughout Europe affected millions of people. However, also the number of persons implicated in these crimes on the side of the perpetrators was immense as

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³ The unconditional surrender was finally effectuated by the document signed in Berlin and bearing the date of 8 May 1945.

⁴ This article follows a paper presented at the Conference titled „Past and Future Issues and Challenges of Prevention of International Crimes and Rise of Intolerance“, which was held at Mykolas Romeris University in Vilnius on December 11, 2015. The Conference was organized within the project “Europe after WWII: Multidimensional Effects of Integration as a Guarantee for State and Human Security“ supported in the framework of the Europe for Citizens programme of the European Union.

may be clearly seen from the statistics showing the number of persons tried and sentenced before judges of the victorious countries, judges of those countries, which were liberated from German occupation, or subsequently by German judges alone.⁵

Nevertheless, not all of the perpetrators of the crimes went to see their judges in the first post-WW II years. The situation after the war was highly confusing with millions of displaced people throughout the whole continent, quite often without any identification documents (Lowe, 2012, p. xiii ff). Other millions of people were being re-settled between states as a result of political agreements.⁶ It is not difficult to realize that under such conditions many from the thousands of offenders managed to escape the first wave of the retribution trials. The emerging Cold War and further political developments in Europe also discontinued the envisaged concerted practice of denazification and punishment of the offenders. First of all, the western allies withdrew their judicial powers over the former Nazi criminals and handed them over to the West Germany.⁷ And, as many authors claim, the re-born German state in the west had very little interest in pursuing criminal trials against the former Nazis. For Germany it was a period of the reconstruction of the state, its infrastructure and last but not least of its society and national identity. It was not politically desired to confront the German citizens with the Nazi past any more (Rückerl, n.d., p. 36 and Schüle, 1964, p.16). As the recent study by C. Safferling and M. Görtemaker reaffirms, the reasons for the ineffectiveness of the German post-WW II justice towards the Nazi past might have also been given by the high number of former Nazi civil servants and judges in the judiciary and especially in the *Federal Ministry of Justice*.⁸ All in all, this situation was favorable to petty offenders from the past (often even directly covered by amnesties⁹), however, it helped also those, who took part in the most hideous Nazi crimes and who evaded justice in the first post-war years.

For several reasons the situation started to change in the end of the 1950s. First of all, with the time passing by and with a new generation coming of age, the German society seemed to have a more objective attitude towards its past (Rückerl, 1979, p. 36). Second, also the international climate might have changed, with East Germany trying to bring the international attention to the fact that the denazification and prosecution of the former Nazis in the west was not carried out with the proper zeal.^{10,11,12}

However, despite increased efforts of the West Germany towards the investigation and prosecution of the Nazi crimes in the late 1950s and in 1960s, German authorities often found themselves tangled up in a legal problem

⁵ E.g. the following figures regarding the numbers of sentenced persons in individual zones can be found: 1.085 in the British zone, (Bassiouni, CH., 1992, p. 214), 1.578 in the U.S. zone, (Grabitz, 1998, p.149 and Taylor, 1951, p. 160), 2.107 in the French zone, rovněž (Rückerl, 1984, p. 99); „several tens of thousands“ in the Soviet zone (here no precise figures were published until recently: (Friedman, Heberer and Matthäus, 2008, pp. 83-84; Rückerl, p. 99); recently the Central Office in Ludwigsburg gives the number of convictions in the Soviet zone at about 12.000, see http://www.zentrale-stelle.de/pb/site/jum2/get/documents/jum1/JuM/Zentrale%20Stelle%20Ludwigsburg/InformationsblattZSt_De13-en.pdf).

⁶ See e.g. Section XII of the Potsdam Agreement of August 1, 1945, however, other mass re-settlements of ethnic and other groups had taken place “wildly” before this agreement was adopted.

⁷ *Treaty for the Regulation of Questions Arising from the War and Occupation*, 1955. More on the transfer of the judicial power to Germany via this Treaty can be found in: (Rückerl; Marrus, 1989, pp. 623-624).

⁸ (Görtemaker & Safferling, 2016, p. 38-40). However, the suspicious comments towards the implication of former Nazi followers in the restoration of democratic judicial system in West Germany were voiced even earlier on, see e.g.(Friedlander in: Marrus, 1989, p. 666; Rückerl, p. 625; Seltenreich, 1999, pp. 81-82).

⁹ To this effect see especially *Gesetz über den Erlaß von Strafen und Geldbußen und die Niederschlagung von Strafverfahren und Bußgeldverfahren*, BGBl. 1949, p. 37; *Gesetz über den Erlass von Strafen und Geldbußen und die Niederschlagung von Strafverfahren und Bußgeldverfahren*, BGBl. 1954, p. 203.

¹⁰ In East Germany the number of trials went to more than ten thousand, with other trials being held directly in the Soviet Union. However and unfortunately, it is often observed that these trials in many cases were also used to deal with the political opponents, who were put on trial for alleged crimes from the Nazi period, despite often not being necessarily implicated in such crimes at all.

¹¹ Illustrative example, where East Germany exercised political pressure on West Germany, is the trial (*in absentia*) of Hans Globke in East Germany. Hans Globke was the director of the (West) German Chancellery under Chancellor Konrad Adenauer. The judgment concerning Globke issued by the *Supreme Court of the German Democratic Republic* on July 23, 1963 (Ref. Nr. 1 Zst (I) 1/63) is available in Rüter, 2003, p. 71 ff. Concerning the figure of Hans Globke and his first-hand implication in the anti-jewish measures in the Third Reich see e.g. (Lommartzsch, and Hans Globke, 2009).

¹² Germany came under international scrutiny for its deemed lack of activity towards the punishment of the Nazi criminals also in connection with the apprehension and trial of Adolf Eichmann in Israel. (Bass, in: Macedo, 2000, p. 80; Arendt, 1963, p. 17).

connected directly with the passage of time. Many of the crimes, which we could consider in their substance as parallel to crimes under the international criminal law, were already barred by the statutory limitations under the applicable German law.¹³

At present time we may observe perhaps the last attempts of the prosecuting authorities in Germany to find and accuse those, who were to a certain degree implicated in the large-scale Nazi crimes, often as members of the concentration camp personnel. As will be seen below, even for the latest indictments the problem of statutory limitations is very topical. However, after several decades of helplessness the public prosecutors were given the new hope. This was presented by the judgment in the case of John Demjanjuk¹⁴, which was decided before the court in Munich in 2011.¹⁵ Using innovative interpretation of the facts and the applicable law, the court in fact opened a gateway to overcome the problem of the statutory limitation and the deficiencies in evidence, which are often connected with prosecution of crimes that occurred so many years ago. Due to the death of John Demjanjuk, while his appeal against the mentioned judgment was still pending, it is yet to be decisively confirmed by the German higher courts, whether the new approach can help the prosecutors to bring successful criminal actions against the last surviving Nazi perpetrators.

Below we will analyze the problem of statutory limitation of crimes under the international law from the perspective of the international criminal law and the national legislation respectively. The cornerstone of this analysis will be the retrospective look at the trials of the former Nazis in Germany both before and (if still possible) after the Demjanjuk judgement.

1. The concept of statutory limitation in general

In the most general sense the prescription (statute of limitation)¹⁶ may be understood as an effect of time, when *“lapse of time may lead to [...] elimination of legal positions [...] lapse of time may render a claim obsolete either in substance or by procedurally blocking its assertion in court”* (Fleischhauer, in: Bernhardt, 1997, p. 1105).

The notion of the statutory limitation is an inherent part of the traditional criminal law. From the procedural point of view it represents a certain time-limit for the prosecuting authorities to open the case against a suspect. Varying approaches and views may be observed in legal doctrines of different states as to the legal meaning of the statutory limitation. One school takes the view that with the lapse of the prescribed period of time the statutory limitation only bars the prosecution for an act, which, however, remains to be criminal in its nature. Others rather claim that with the passage of the given period of time the act itself loses its harmful effect and it is no longer to be seen as a criminal offence; thus it is impossible to prosecute a person for an act, which is not criminal anymore (Kienapfel, Höpfel & Kert, n.d., p. 156). Nevertheless, in both cases the practical implications are equal as the courts have the obligation to examine the case in light of the statutory limitation *ex officio*.

The rationale behind the concept of the statutory limitations is also framed by practical considerations. With the increasing gap between the commission of a criminal offence and the investigation/trial, it becomes gradually more difficult to produce reliable evidence by the prosecution, which bears the *onus probandi*. All the more this may apply to the prosecutions for the crimes committed by the agents of the national-socialist regime, which have been instituted only recently (see *infra*). Thus also in cases of the large-scale criminal activities, which with no doubt occurred throughout Europe as early as in 1939, the prosecution is faced with lack of unequivocal documentary evidence¹⁷ and fading memory of the last surviving witnesses (not mentioning crimes committed

¹³ Similar situation could be found e.g. in Austria.

¹⁴ John Demjanjuk was alleged to be a member of the group of guards in the extermination camp in Sobibór in then occupied Poland.

¹⁵ Judgement of *LG München I Ks 115 Js 12496/08*, 2011 in: Rüter, C. F., De Mildt, D. W., 2012, p. 227 ff.

¹⁶ Both terms are used *mutatis mutandis* in this paper, though traditionally the common law countries would rather use the term „statute of limitation“, whereby the continental legal doctrine would go with the term „prescription“.

¹⁷ The Nazi documents were to a large extent destroyed at the end of the WW II, further on the evidentiary possibilities were also obliterated by the Cold War as some of the documents ended in the hands of the western allies and some of them in the hands of the

by the Nazi Germany against its own subjects, the Jews resident in the Reich¹⁸, after Hitler seized power and before the outbreak of the WW II, which may be qualified in certain cases as crimes against humanity from the perspective of the recent international criminal law¹⁹ as well).

2. Statutory limitation from the perspective of the international criminal law

The international criminal law's position towards the statutory limitations is almost simple and plain. Most importantly we may point to the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (hereinafter referred to as "Convention").^{20,21} By its commentary, the International Committee of the Red Cross ("ICRC") mentions that this Convention "*was occasioned by the fear, which grew in the mid-1960's, that German war criminals of World War II, who had not yet been apprehended, might escape prosecution because of the expiration of the periods of limitation applicable to their crimes. The Convention was prepared by the Human Rights Commission and thereafter adopted and opened for signature by the General Assembly of the United Nations.*"²² The Convention itself states in its preamble that none of the international legal documents adopted previously with respect to crimes under the International Law does express itself on the topic of the period of limitation of such crimes. Therefore the Convention goes further and states in its Art. 1 and 2 that no principle offender or accomplice in commission of war crimes or crimes against humanity, irrespective if a State authority or a private individual, shall benefit from the period of limitation with respect to these crimes.²³

Nevertheless, as it may be apprehended also from the above mentioned citation from ICRC webpage and from the Convention itself, the modern outset of the International Criminal Law, which could be marked by the *Charter of the International Military Tribunal*²⁴ (hereinafter referred to as the "Charter"), did not yet give such a solid answer to the issue at hand.

Soviets. An issue of documents forged by the Soviets was raised even in the case of John Demjanjuk, whose personal identification card as a Trawniki guard was claimed to be forged only subsequently by the Soviet officials.

¹⁸ See the *Reich Citizenship Law*, (*Reichsbürgergesetz*, RGBL. 1935, p. 1146) which was part of the Nuremberg Laws and drew a line between Reich's "citizens" and "subjects".

¹⁹ However, the International Military Tribunal in Nuremberg did not take these crimes into account. This was due to the framework of the crimes against humanity, which was used in Art. 6(c) of the *Charter of the International Military Tribunal* (see the *London Agreement* of August 8, 1945 and the Charter of the International Military Tribunal attached thereto) and p. 80 of the IMT judgement (*France et al. vs. Göring et al.*, 1946, 22 IMT). In contrast, the subsequent trials held by the Allies (and especially by the German courts based on a competence transferred to them by the Allies for the cases of crimes against humanity perpetrated on German nationals and stateless people) in the occupation zones pursuant to the *Control Council Law Nr. 10* (issued on 20th December, 1945) were able to focus also on these criminal activities due to a slightly different definition of the crimes against humanity in Art. II(1)(c) of this Control Council Law. Bryant, in: Griech-Poelle, B. A., 2009, p. 43 ff.

²⁰ (Fleischhauer, C.-A., p. 1108). The Convention was adopted on November 26, 1968, entering into force as of November 11, 1970. As of 2016 the Convention has 55 state parties, however, lacking the accession of the United States of America or the Federal Republic of Germany.

²¹ See also the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* from January 25, 1971, which, however, has only 8 ratifications up to this date.

²² See <https://www.icrc.org/ihl/INTRO/435?OpenDocument>.

²³ The Art. 1 of the said Convention even transcends the classical notions of these crimes under the international law to certain extent: „No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Convention of 12 August 1949 for the protection of war victims; (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.“

²⁴ The IMT was later based in the Bavarian city of Nuremberg though this was not the original plan and the formal seat of the IMT was in Berlin. See Art. 22 of the Charter and for further reference see also Report of Robert H. Jackson, 1949, p. 340 ff.

Scanning through the text of the Charter²⁵ we cannot find any direct mention of the statutory limitation (or its exclusion) with respect to the crimes under the international criminal law enshrined in the Charter. Though the Charter as well as the judgement of the *International Military Tribunal* (“IMT”) were mute in their wordings on this issue, one may recite e.g. the French *Court de Cassation* in the notorious Klaus Barbie case: “*The only principle with regard to the statutory limitation of prosecution of crimes against humanity which is to be considered as deducible from the Charter of the International Military Tribunal is that prosecution of such crimes is not subject to statutory limitation.*”²⁶

The considerations regarding the inapplicability of statutory limitations to the crimes under the International Law are thus based on the very nature of these crimes. The crimes are deemed to be of such seriousness to transcend all boundaries of what the traditional domestic law could grasp. Exactly this feature is the one that makes them distinct from the “ordinary” crimes, which are traditionally punishable by the norms of the domestic criminal laws. In words of H. Silving, if “*there is crime so enormous, injustice so flagrant, that existing institutions, however rational, just and functional they might be, must yield. For no sane legislator could have contemplated such crime to be even possible and no tribunal could have been provided for its adjudication in advance* (Silving, in: Re Eichmann, 1961, p. 336).” While reflecting on these large-scale crimes it is almost as important to prosecute the individual suspects as to share the general awareness of such crimes in order to distribute justice, punishment, prevention and present a lesson to the general public.

In this more historical perspective we may take one further detour to the decision of the *Court de Cassation* of France in the Klaus Barbie case, which held: “*The right to benefit of statutory limitation of prosecution cannot constitute a human right or fundamental freedom. The Court of Appeal then referred to Article 7(2) of the Convention [European Convention on Human Rights], as well as to Article 15(2) of the Covenant [International Covenant on Civil and Political Rights]. In fact, neither of these provisions gives rise to any derogation or restriction on the rule that prosecution is not subject to statutory limitation. This rule is applicable to crimes against humanity by virtue of the principles of law recognized by the community of nations.*”²⁷ Thus besides underlining the fact that the statutory limitations do not apply to the crimes under the international law *per se*²⁸, it also provides that there is nothing in the international customary law that would make it impossible to exclude the applicability of statutory limitations to this gravest act of criminal conduct the world has seen up to the date. Therefore not even the Art. 7(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*²⁹ does prevent the state parties to this European Convention to exclude statutory limitation to the most serious types of crimes through its national legislation, nor is the international community prevented from doing the same by virtue of treaties.

Besides these observations, it may further be implied from Art. 7(2) that a person may be prosecuted and tried also for criminal conduct, which was not formally and explicitly part of the national criminal legislation at the moment of its commission, as long as this act could have been seen as criminal according to the international customary law. The customary nature of the crimes enshrined in the Charter was affirmed not only by the judgement of the IMT³⁰, but also by the *Resolution of the UN General Assembly Nr. 95 (1946)* issued by the General Assembly of the United Nations on December 11, 1946.

²⁵ The same holds true to the subsequent Control Council Law 10, which was significantly and almost literally inspired by the Charter.

²⁶ Klaus Barbie Case, Court de Cassation, January 24, 1984. See https://www.icrc.org/customary-ihl/eng/docs/v2_cou_fr_rule160 and <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007061605&fastReqId=2030975175&fastPos=1>. However, in its follow up decision the Court de Cassation went on to say that statutory limitations may be applicable to war crimes, thus effectively barring the prosecution of Barbie for this kind of crimes under the international law (see the ruling of the Court de Cassation of December 20, 1985). As a result Klaus Barbie was sentenced to life imprisonment only for crimes against humanity.

²⁷ See https://www.icrc.org/customary-ihl/eng/docs/v2_cou_fr_rule160 and <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007061605&fastReqId=2030975175&fastPos=1>.

²⁸ However, in the international legal doctrine some authors even point out that the non-applicability of the statutory limitations to crimes under the international law may already be a part of the customary law. (Cryer, Friman, Robinson & Wilmhurst, 2010, p.78).

²⁹ Convention was signed on November 4, 1950.

³⁰ See e.g. p. 54 of the IMT judgment.

Most recently the inapplicability of the period of limitation to the crimes under the international law has been also clearly reaffirmed by the *Statute of the International Criminal Court*, Art. 29.³¹

Furthermore, should the statutory limitation be a procedural instrument, as some doctrinal views claim, we may also speak about the jurisdiction *ratione temporis*. In such case we may observe that it was stated already in the *Lotus Case*³² that a state may assume jurisdiction in any criminal case, unless there is an existing rule in international law, which negates such power (In Eichmann, I.L.R., 1961, p. 36-39). On the grounds of the arguments presented above it is obvious that there is no such rule in the international *ius cogens*. To the contrary, states are expected to exclude prescription of the crimes under international criminal law.³³

To sum up all these conclusions, it is absolutely in line with the general principles of law recognized by civilized nations to call the crimes under the international law not to be subject to the period of limitation of prosecution. The above grounds give a robust base for the prosecution of Nazi crimes not only on the international but also on the national level. As we will further see on the example of Germany (and its former western part respectively), however, this possibility was not fully exploited by the public authorities for various reasons; one of the reasons being the standard statutory limitation of such crimes as provided by the domestic criminal law, which was applied. Only the latest court decisions in Germany seem to be opening a brand new perspective on how to tackle these legislative setbacks.

3. National law and statutory limitation of Nazi crimes in post-WW II Germany

3.1. West Germany between 1945 and the restoration of its full judicial sovereignty

Once Germany made its unconditional surrender to the allied powers in May of 1945 it was a “*failed state*” (*USA v. Josef Altstoetter et al.*, p. 960 and Perels, in: Buck, 1997, p. 31). Not only the material resources of the state were exhausted but also the human resources of reliable and educated officials not implied in the former machinery of the Nazi regime were scarce. The allied powers tried to mend this situation by assuming most of the functions of the legislative, administrative as well as judicial powers in the country, which was then divided into four occupation zones.

Originally this was done by a concerted practice exerted by the supreme body established by the allies for Germany, the (*Allied*) *Control Council*³⁴, which was supposed to be the highest authority for questions regarding Germany and which was composed of supreme commanders of the individual occupation zones. This Control Council had also legislative powers, which were exercised through “Control Council Laws”. One of the first such laws was also the *Control Council Law Nr. 4 on Reorganisation of the German Judicial System* from October 30, 1945.³⁵ This Law virtually excluded the jurisdiction of regular German courts with respect to the crimes connected with the Nazi regime and perpetrated on citizens/subjects of other states apart from Germany and stateless persons. Thus, as H. Friedlander noted, “*Control Council Law No. 4 had specifically excluded the German courts from dealing with Nazi crimes, and until 1950 no German court was permitted to judge crimes committed against Allied nationals; this effectively removed most wartime offenses, including the mass murder of the Jews, from German judicial jurisdiction. But Control Council Law No. 10, which provided for the creation of tribunals to try Axis war criminals, included a possible exception: Such tribunal may, in the case of crimes*

³¹ *Statute of the International Criminal Court* signed in Rome on July 17, 1998.

³² See *France vs. Turkey (1927)*, P.C.I.J. Rep., Series A, Nr. 10.

³³ State parties to the Convention are expressly required to do so, indeed.

³⁴ Established through the *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany* (and attached *Statement on control machinery in Germany*) from July 5, 1945. See [http://www.jstor.org/sici?sici=0002-9300\(194507\)39%3A3%3C171%3AUSBUDR%3E2.0.CO%3B2-G&](http://www.jstor.org/sici?sici=0002-9300(194507)39%3A3%3C171%3AUSBUDR%3E2.0.CO%3B2-G&). See also the *Proclamation Establishing Control Council* from August 30, 1945, available also online at [http://www.jstor.org/sici?sici=0002-9300\(194507\)39%3A3%3C171%3AUSBUDR%3E2.0.CO%3B2-G&](http://www.jstor.org/sici?sici=0002-9300(194507)39%3A3%3C171%3AUSBUDR%3E2.0.CO%3B2-G&).

³⁵ See www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities (Friedlander, pp. 668-669 and Rückerl, p. 666)."

This situation was changed first between 1949 and 1955, when the West Germany's courts were gradually returned their full sovereignty in judicial matters. According to Art. III(3) of the *Treaty for the Regulation of Questions Arising from the War and Occupation* the "German courts of law may exercise the jurisdiction they have under German law [...] in criminal proceedings against native persons [i.e. German nationals or other persons subject to the ordinary jurisdiction of German courts], unless the investigation of the alleged punishable offence was conclusively terminated by the prosecutors of the power or powers concerned [...]"³⁶

It follows that the western Allies decided to transmit the prosecutorial/judicial authority over the Nazi crimes to West Germany in accordance with its national laws. By doing so the Allied powers yielded implicitly to the legal skepticism, which resonated in the German scholarship as well as in the opinion of the general public with respect to the disputed retroactivity of the IMT Charter from 1945, which framed the concepts of the crimes under the international law in writing for the first time (Wittmann in: Heberer & Matthäus, 2008, pp. 214-215).

3.2. The applicable domestic law in (West) Germany

The applicable domestic law in Germany was and still is the German *Criminal Code* (hereinafter referred to as the "Code") originating from the year 1871 (*Strafgesetzbuch*, RGBI. 1871, p. 127); thus a piece of legislation predating the 20th century by almost 30 years, predating the WW I by almost 45 years and predating the last global conflict represented by the WW II by almost 70 years. It comes with no surprise at all that this Code was shaped in a traditional way, which presented serious difficulties in how to grasp crimes perpetrated in such vast and concerted practice as were the crimes of holocaust, exploitation of slave labor, and large-scale persecution of domestic civilian population etc. under the auspices of Nazi Germany.

It may be useful for the further analysis in this paper to mention at least the leading types of crimes from the Code, which were and in certain cases still are relevant for the prosecution of the Nazi perpetrators from 1950s onwards. Due to time limitations (see *infra*) the most important type of crime enshrined in the Code would be the crime of murder. However, its definition within the Code itself may also present certain difficulties for the prosecution of the Nazis. The Code in Art. 211(2) describes a murderer, who ought to be sentenced to life imprisonment as the highest possible penalty known in the Code, as someone, who willfully kills another person "out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives, treacherously or cruelly or with means dangerous to the public or in order to make another crime possible or cover it up." Other ways of killing another person may amount "only" to manslaughter described in Art. 212(1) of the Code (punishable with penalty of "not less than 5 years") or to aggravated manslaughter in Art. 212(2) punishable eventually even with "life imprisonment".

The crime of murder according to the German law thus requires special *mens rea* to be present in the mind of the perpetrator of such a crime and this special intent must be proven beyond all reasonable doubt by the prosecution during the trial. Otherwise person could be sentenced to aiding to murder, however, in such case much more lenient sentence would usually follow. These considerations alone had very serious implications for the trials with the former Nazis. If the prosecution wished to present a successful accusation for a crime of murder, it had to prove that the former Nazi was motivated to his involvement in the murderous operations by the above mentioned reasons, which were required by the Code in Art. 211(2). Otherwise the person would escape punishment completely or get away with only a relatively minor penalty. Paradoxically proving this special form of qualified intent was easier in case of rather unimportant Nazi henchmen, who did the killings with their own hands, than in cases of superior officers, who were often not present at the sites of killings but who practically bore higher moral as well as technical responsibility for the crimes.

³⁶ See *Treaty for the Regulation of Questions Arising from the War and Occupation*, 1955. The excerpt from the Treaty can be found in: (Rückerl, pp. 623-624).

3.3. Statutory limitation in the German Criminal Code and debates over the exclusion of statutory limitation vis-a-vis the most serious crimes from the Nazi period

Besides other lacunae (stemming as mentioned from the very nature of the 19th century Code, which was not able to grasp such complex crimes) the principal difficulty with application of domestic law to Nazi crimes in West Germany has been linked to the notion of statutory limitation inherent in the Code. The Code originally prescribed periods of statutory limitation to 5, 10, 15 and 20 years according to the seriousness of each crime embodied in the Code.³⁷ The passage of the period of limitation is discontinued immediately upon the arrest of the suspect or the official opening of the proceedings against the suspect.³⁸

The prosecuting as well as judicial authorities jointly used May 8, 1945 as the reference day for the beginning of the period of limitation with respect to crimes committed under the umbrella of the Nazi Germany (i.e. the crimes, which fell outside of the scope of the general criminality and which were committed on behalf of the regime). This was later confirmed e.g. by the German supreme judicial authority, the *Federal Court of Justice /Bundesgerichtshof/* ("BGH"), which stated: "*As the limitations for all criminal acts, which could not be prosecuted in the national-socialist time due to illegal political attitudes of the leaders in power, follow directly from § 69 of the Code [...] It can rather be implied that in individual cases these actions were criminal, but could not be objectively prosecuted because of the „Führerwille“, which was observed as a law itself. [...] As a consequence of this the period of prescription shall be set to May 8, 1945, i.e. the day of the capitulation of Wehrmacht.*"³⁹

Taking this into account, the least serious crimes of the Nazi lackeys were barred from criminal prosecution upon the lapse of 5 years period in May 1950. Crimes punishable by up to 10 years of imprisonment were barred in 1955. The most serious crimes, most likely to be aligned with various forms of crimes under the international law, were barred after 15 years (e.g. manslaughter, deprivation of liberty which effectuated death of the person or bodily harm which effectuated death of the person), or after 20 years respectively (murder, aggravated manslaughter).

Public and political debates in West Germany started reflecting this issue even before the lapse of the 15 years period, however, this debate had at first only a very limited practical outcome. On May 24, 1960 (i.e. already after the prescription of the crimes within the 15 years period became effective) the *Bundestag* voted down a bill presented by a group of MPs, according to which crimes, which were punishable with 10 years of imprisonment and more, would start their period of limitation from September 16, 1949.^{40,41} We may add that among the principal objections to this bill was the argument that such legislation would violate Art. 103(2) of the *Basic Law for the Federal Republic of Germany*.⁴² Another argument voiced in the debate was the allegation that all the relevant crimes had already been prosecuted for by 1960 anyway.

³⁷ See § 67 of the Code as until 1975. After significant amendments to the Code in 1975 the provisions on the statutory limitations may currently be found in § 78 ff. of the Code.

³⁸ See the recent wording of § 78c of the Code; the Code in the wording binding until 1970s coordinated the discontinuation of the passage of the period of limitation to the first „action of a judge against the perpetrator of the crime“.

³⁹ See decision *BGH I StR 540/62* from 28 May 1963.

⁴⁰ 15 September 1949 was the date of the first general elections in West Germany, bringing Konrad Adenauer to the position of the Chancellor.

⁴¹ The whole story of the parliamentary debates in the German *Bundestag* regarding the statutory limitation of the Nazi crimes (covering the whole period of the debates from the 1960s until 1979) is comprehensively covered (including all various unsuccessful bills presented over the period) in: *Zur Verjährung nationalsozialistischer Verbrechen*. Bonn: Deutscher Bundestag Presse- und Informationszentrum, 1980.

⁴² The Basic Law for the Federal Republic of Germany */Grundgesetz für die Bundesrepublik Deutschland/* from May 23, 1949 (BGBl. 1949, p. 1). Art. 103(2) of the Basic Law reads as follows: „An act may be punished only if it was defined by a law as a criminal offence before the act was committed.“ It is therefore a standard provision reflecting the principle of non-retroactivity in criminal law.

As a result it was possible to prosecute only the most serious crimes after 1960 (those, for which the Code envisaged the maximum penalty of life imprisonment and the period of limitation of 20 years), i.e. murder and “aggravated” manslaughter (but not “regular” manslaughter).⁴³ As A. Rückerl, the former head of the *Central Office of the State Justice Administrations for the Investigation of National Socialist Crimes in West Germany*⁴⁴, once pointed out: “The number of proceedings, which had to be abandoned in the following years because the conduct qualified as manslaughter (in dubio pro reo⁴⁵) was barred by the statute of limitation in 1960, shows clearly that the effects of this decision were underestimated by the Bundestag (Rückerl, pp. 155-156).”

The debate over the prescription of the most serious crimes with the period of limitation of 20 years was once again revived in Germany’s Parliament around the year 1965, when the complete limitation was almost about to take effect. Once again a legislative bill was presented by a group of MPs, which sought to exclude the statutory limitation in cases of the most serious crimes known in the Code (*Zur Verjährung nationalsozialistischer Verbrechen. Teil I.*, p 144). This bill was significantly amended in the ensuing parliamentary debate and adopted on March 25, 1965. The Act in its final version stated that the starting point for the passage of the period of limitation should be the end of year 1949, effectively prolonging the period of limitation until January 1, 1970 (*Gesetz über die Berechnung strafrechtlicher Verjährungsfristen*, BGBl. 1965, p. 315). This means that the periods of limitation were not extended as such but only the beginning of their passage was postponed until January 1, 1950. This new date was chosen on the premise that the German judiciary and prosecution enjoyed full sovereignty over the crimes from the era of the Nazism first from that date onwards (Grabitz, p. 154).

Nevertheless, this piece of legislation also provided in its § 1(2) that these new rules should apply only to crimes, which had not yet been barred from prosecution by the lapse of the originally applicable statutory limitations (i.e. all other crimes apart from murder and aggravated manslaughter). During the parliamentary debate it was also considered that adoption of such legislation would require direct novelization of the Basic Law but this eventually did not occur.⁴⁶

Despite this late legislative effort it was soon becoming obvious that it would have been naive to believe that all investigations of crimes from the Nazi period could be thoroughly carried out until the beginning of the year 1970. The Federal Government /*Bundesregierung*/ thus presented yet another bill of an act in 1969, which would, if adopted, stipulate general inapplicability of statutory limitation to crimes punishable by the maximum sentence of life imprisonment. As ever before, this initiative was not fully approved by the *Bundestag* and the subsequent 9th Act on the Change of Criminal Law /9. *Strafrechtsänderungsgesetz*/ (9. *Strafrechtsänderungsgesetz*, BGBl. 1969, p. 1065) did nothing more than only prolonged the period of limitation from 20 to 30 years. In connection with the previous Act from 1965 mentioned above the period of statutory limitation for murder and aggravated manslaughter was to take effect on December 31, 1979.

Albeit according to A. Rückerl “many had immediately warned that it would become necessary to raise the issue [of statutory limitation pertinent to Nazi crimes] once again in 1979” (Rückerl, p. 205), the idea of complete inapplicability of statutory limitations was not echoed in the *Bundestag* in 1969. However, these warnings really found their expression in the German Parliament in 1979, when it was once again preoccupied with this question. Following a rigorous debate it finally adopted the 16th Act on the Change of Criminal Law /16. *Strafrechtsänderungsgesetz*/ (16. *Strafrechtsänderungsgesetz*, BGBl. 1979, s. 1046). This piece of legislation put fully aside the statutory limitation in case of murder (§ 211 of the Criminal Code), on the other hand, it omitted to do the same for aggravated manslaughter (§ 212(2) of the Criminal Code). As from January 1, 1980 it has

⁴³ §§ 211 and 212(2) of the Code.

⁴⁴ *Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen*. More on the role of this quasi-prosecutorial body, seated in Ludwigsburg, e.g. in: (Schüle, 1964; Schrimm & Riedel, 2008, no. 56); and at the webpage of the Central Office at <http://www.zentrale-stelle.de/pb/Lde/Startseite>.

⁴⁵ I.e. in case the court has doubts as to whether the conduct constitutes murder or aggravated manslaughter or (regular) manslaughter, it has to decide in a way more favorable to the accused. Therefore in such case the conduct must be qualified as manslaughter.

⁴⁶ See the bill of an act amending the Basic Law in: *Zur Verjährung nationalsozialistischer Verbrechen*, op. cit., p. 146.

been therefore possible to prosecute successfully a person implicated in Nazi crimes only for a crime of murder.⁴⁷

In order to make this picture of the problems pertinent to the situation in post-war (West) Germany⁴⁸ complete it should be mentioned that all these national legislative discussions ran parallel with the events in the international arena. West Germany fully by-passed the developments of the international law.

As the above citation from the webpage of the ICRC illustrates, West Germany's legal system could be seen as a perfect example of domestic legislation, which is unable (or unwilling) to grasp the crimes under the international law.⁴⁹ Despite the fact that West Germany amended its Criminal Code by including a new § 220a (punishment of genocide), it also made clear that for the sake of the adherence to the general legal principle of non-retroactivity in criminal law these provisions would only be applicable to *pro futuro* cases (i.e. definitely not to crimes perpetrated before the inclusion of these provisions into the Criminal Code, which took effect in 1954) (Rückerl, p. 151). The same holds true also for other provisions originating in the international criminal law. All of them had been pronounced as not applicable to crimes perpetrated before their formal enactment in the written international legal instruments (either in the Charter, in the Control Council Law Nr. 10 or others⁵⁰).

To be fair, from the most recent perspective, however, the Federal Republic of Germany can be seen as one of the world's leaders in promoting the standards of the modern international criminal law. The representatives of Germany took active part in the process of drafting of the ICC Statute (Kress, in: K. G. Saur, 2006). Germany also adopted a specialized national legislation, the *Code of International Criminal Law /Völkerstrafrechtgesetzbuch/ (Völkerstrafgesetzbuch, BGBl. 2002, p. 2254)* in 2002, which fully and thoroughly harmonizes national law with the standards of the international criminal law. This codification provides in its § 5 that the statutory limitations do not apply to any of the crimes under the international law, which are encompassed in the following paragraphs of this national legislative act. Nevertheless, not even this recent legislation would be applicable to the cases of Nazi crimes due to the doctrine of non-retroactivity. This means that even after the adoption of the *Code of International Criminal Law* the domestic prosecutors and courts have to apply the regular Criminal Code while dealing with Nazi perpetrators.

The German stubborn reluctance to apply the standards of the international criminal law to cases of Nazi crimes may, in fact, be seen as the main triggering point for the international concerns about the possibility to apply the time limits for prosecution of these grave crimes. Up to now the German courts have been refusing (unable) to apply anything but the standard domestic laws to the cases of the Nazi criminals; i.e. only laws, which pre-dated the commission of these crimes. Minor changes, which were enacted in order to postpone or exclude statutory limitation (effectively only in case of murder-type crimes), were not in time and were not enough to render justice over most of the criminal perpetrators from the Nazi era.

3.4. Demjanjuk, Gröning and the others – a sudden shift in prosecution of Nazi crimes?

The statutory limitation has not been the only neuralgic point in the prosecution of Nazi crimes in Germany, though its role has been very prominent. The statutory limitation caused that the only option, which was left to the prosecution, was to prosecute for the crime of murder or for being an accessory thereto, if one could not prove the immediate involvement of a person in the actual murderous act. It was often easier to prove guilt of

⁴⁷ See also <http://www.zentrale-stelle.de/pb/Lde/Startseite/Arbeitsweise/Straftaten>.

⁴⁸ Different impression could be made if we took a look at the situation in East Germany. The regulation stemming from the public international law was adopted into the national legislation of East Germany in 1968 (*Criminal Code /Strafgesetzbuch/* from January 14, 1968, GBl. I Nr. 1/1968). Even before this moment the courts in East Germany repeatedly relied on the IMT Charter and Control Council Law Nr. 10 during individual criminal trials. However, as mentioned before, it should be noted that these legal norms were used also for purpose-built trials. See e.g. (Grabitz, p. 154).

⁴⁹ See footnotes supra nr. 18 and 19.

⁵⁰ E.g. the *Convention on the Prevention and Punishment of the Crime of Genocide*, which was approved by the resolution of the UN General Assembly on December 9, 1948.

low ranking members of the camp staff than of the highly positioned officers, who stayed away from the actual killing sites, though they had the crucial impact on the functioning of the camp's machinery. The prosecution often rather focused on the cases of excesses⁵¹, where it could prove that a person was directly involved in a concrete instance of killing of an inmate in a concentration camp, or on those persons, who were part of the units directly dealing with the mass killing operations. Additionally, in absolute majority of verdicts the defendants were, if at all, convicted only for being accessories to murder. This resulted in relatively very lenient sentences (Ostendorf, in: Hankel & Stuby, 1995, p. 81 and Rückerl, in: Band II, Teil C. Essen: C. H. Beck, 1996, p. 35).

This “*tainted law*” (Wittmann, pp. 211 ff) caused that German prosecutors and judges had been tangled up in a deficient system, which gave no real hope for successful, thorough and in higher meaning of such word also fair punishment of the Nazi perpetrators.

Nevertheless, following the most recent case-law of the German courts it seems that the prosecution of former Nazi concentration camp personnel could get one ultimate stimulus. Only very recently we may observe a new legalistic approach of the German courts towards the last surviving Nazi camp personnel. Those, who have been put into the dock in the courtrooms in Germany recently, are Oskar Gröning, Reinhold Henning and most notably John (Iwan) Demjanjuk.

Gröning⁵², nicknamed by the media as the “*accountant of Auschwitz*”⁵³, served in the camp's administration since 1942 and was appointed to the tasks of evidence of “prisoners' property”. He was also active on the notorious ramp in Auschwitz-Birkenau, where he had the task to observe that all property of the newly arriving people is correctly and orderly sorted (Gröning judgment, 2015, pp. 9, 11). After the war he worked as an accountant and despite having his case investigated in 1970s and 1980s, he had not been charged until recently. The judgment by the Regional Court /*Landgericht*/ (“LG”) in Lüneburg was pronounced in July 2015; however, due to an appeal to BGH it has not become final yet.

Henning⁵⁴ performed duties of a low ranking camp guard in Auschwitz between 1942 and 1944. His transfer to the Auschwitz camp was effectuated after him being heavily wounded on the Eastern front in 1941, after which he could not perform the front duties any more. After the war he spent time in POW camps in the Netherlands and in Britain and since 1948 he has been living back in Germany (Henning judgment, 2016). The judgment by the Regional Court in Detmold was passed in June 2016 but was also challenged before the BGH.

The last of these recently convicted Nazi perpetrators (but chronologically the first to have his case settled before the German court of law), Demjanjuk, had the most vibrant story behind himself. Being of Ukrainian origin, he was conscripted into the Red Army before being taken prisoner by the German forces in Crimea. In order to escape from the POW camp and the miserable conditions, to which the Soviet POWs were subjected, he volunteered to become a police auxiliary and was subsequently trained in the Trawniki camp.⁵⁵ From there he was assigned to various camps as a guard, including the extermination camp in Sobibór. After the WW II Demjanjuk immigrated to the USA and became naturalized there in 1958. On the pretext that Demjanjuk could have been the sadist camp guard “Ivan the Terrible” of Treblinka extermination camp, he was stripped of his U.S. citizenship and extradited to Israel for a trial, which ended up in vain. Although Demjanjuk was found guilty and sentenced to death⁵⁶, the Israeli Supreme Court acting as the court of appeal quashed the decision of the first instance on the lack of evidence that Demjanjuk had served in Treblinka and that he could be aligned to

⁵¹ „*Exzesstat*“ in German, see e.g. (Friedrich, 1984, p. 377; Wittmann, 2005, pp. 46-47; Freidlander, in: Marrus, 1989, pp. 639-640).

⁵² His rank within the SS hierarchy was *SS-Unterscharführer* (corporal).

⁵³ See e.g. http://www.ndr.de/nachrichten/niedersachsen/lueneburg_heide_unterelbe/Fall-Groening-Die-Schuld-eines-kleinen-Raedchens,auschwitz416.html.

⁵⁴ *SS-Sturmmann* (private).

⁵⁵ See the description of the role of the Trawniki camp in the Demjanjuk judgment, 2011, in RÜTER, C. F., DE MILDT, D. W., 2012, p. 227 ff.

⁵⁶ Demjanjuk was sentenced to death as the second person in the history of the state of Israel, after Adolf Eichmann. See e.g. <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007956>.

Ivan the Terrible. Although the Supreme Court did not exclude a possibility to prosecute and try Demjanjuk on different charges, no such trial took place in Israel. Demjanjuk's U.S. citizenship was consequently restored. In 2002 Demjanjuk's citizenship was once again revoked after a long battle before U.S. courts, this time on the pretext that he had served as a camp guard in Trawniki itself, in Sobibór and a couple of other concentration camps. Subsequently, upon the request from Germany, Demjanjuk was extradited there to stand for a trial, which was opened in 2009. The verdict was passed in May 2011, but never became final due to an appeal to the BGH and death of the defendant while the appellate proceedings were still pending.

Before the Demjanjuk's trial in Germany was opened, many had questioned its meaning: "*But after more than 60 years of prosecutions, what remains? In a strictly legalistic sense, the relevance of further trials is waning; with so many having taken place, they are unlikely to set new legal precedents. [...] So why now --- especially given that, according to Zuroff⁵⁷, Germany could have taken charge of the Demjanjuk file years ago? 'I presume it was a political decision' says Christoph Burchard⁵⁸. 'To have the last big Nazi trial in Germany'. (Engelhart, in: Maclean's, 2009, pp. 29-33)*" According to the editor of the most comprehensive collection of German judgments in the cases connected to Nazi crimes, C. F. Rüter, it was "*entirely bewildering how anyone familiar with the German legal system could expect a conviction of Demjanjuk with this evidence.*"⁵⁹

In fact much of this skepticism was substantiated back in 2009. The previous and in a way consistent case-law of German courts did not give too much hope for succeeding in trials of rather unimportant auxiliaries from the camps administration. Further on, it was unlikely that after more than 60 years from the end of the WW II it would be able to prove yet one single case, when the defendant directly participated in murdering of the victims either in Sobibór or in Auschwitz.

To a great surprise the German court in the Demjanjuk case, later being followed in the cases of Gröning and Henning, opened a new late chapter in the prosecution of the Nazi criminals; at least of those, who could still be brought before a court. Demjanjuk was sentenced to 5 years in prison for being an accessory to 28.060 murders of Jews in Sobibór. Gröning heard the term of 4 years of imprisonment for assisting in 300.000 cases of murder, while Henning's penalty amounts to 5 years in prison being an accessory to 170.000 cases of murder.

The number of the victims, whose murders the defendants were implicated in, was determined according to the number of camp's victims in the period, when they were in active service in the camps.

The legal reasoning, which was put forward in all three recent cases, is based on the idea that anybody, who served in a camp, where mass killing took place during the WW II, was aiding to achieving the murderous goals of such facility. This was the case regardless of the actual position in the camp's hierarchy and organization. Even the mere physical presence of a uniformed person on the ramp, when the train with victims arrived, had according to the courts the effect that such activity „served the purpose to immediately extinguish any possible thoughts on resistance or escape” (Gröning judgment, n.d. p. 36). Also those, who were not directly employed to guard the victims on the way to the site of the actual killing, “had the duty to stop any resistance or attempts to flee by the use of weapons”.⁶⁰ In this way, all the people in the camp's machinery, whether highly ranked or just minor wheels, contributed to the realization of the Final Solution or at least of its part, for which they were present in the camp and may be held accountable for it.

Crucial element was the knowledge of the person in question about the murderous operations carried out on the site. In case of the personnel in Auschwitz and in Sobibór the judges had no doubt about such knowledge being present in the minds of the SS staff and other personnel since the killing function of these camps was their prominent feature; in case of Sobibór, as a purely extermination camp used for the Operation Reinhardt, it was

⁵⁷ Efraim Zuroff, Director of Simon Wiesenthal Centre office in Jerusalem.

⁵⁸ Professor of law at Goethe-Universität, Frankfurt am Main.

⁵⁹ Cited according to <http://harpers.org/archive/2012/03/ivan-the-recumbent-or-demjanjuk-in-munich/1/>.

⁶⁰ Ibid.

even its only mission to exterminate people in an industrial manner. As the court stated in the Demjanjuk judgment: “*The defendant supported the realization of the main act [i.e. the crime of multiple murder] by his active contribution. All actors in the chain of command, who were not already principal offenders, had their tasks in herding of Jewish citizens [...], in their transport to extermination camps and [...] murder in gas chambers – beginning with the members of the RSHA appointed with the execution of the extermination of Jews, and following with members of the Reich’s Rail, persons in the administration of the General Government, camp commanders, individual SS and police officers in the camps and from them commanded senior and junior guards.*” (Demjanjuk judgment, Sec. D (I) (2))

The courts also considered, whether the defendants had actually any chance to avoid their duties in the camps without facing severe punishment. Based on historical studies and expert opinions, the courts arrived to the conclusion that all of the defendants had a chance to either request a transfer to fighting units at the front or had other options. In case of Demjanjuk, who was a POW⁶¹, the court stressed that he could have even sought to escape from the camp and join the partisan formations in the nearby forests of Eastern Poland, which had been the case for some other Trawniki guards from Sobibór before. (Demjanjuk judgment, Sec. A (III) (5)) Thus the courts held that the defendants indeed had a moral choice as to whether they accept their position in the camp’s machinery or if they refuse to identify themselves with such a horrendous place and mission.

This new development could help to overcome the problem of statutory limitation, which made it impossible to prosecute various crimes, which occurred in the camps and which were barred by the statutory limitation, as early as in 1950s. It does not put aside the notion of statutory limitation in the German law vis-a-vis Nazi crimes as such, however, it presents a certain tackling maneuver. As such the law applied has not changed in the meantime. It was the line of interpretation of the facts of the case and of the concept of murder in the German Criminal Code that were changed in the Demjanjuk’s judgment and followed by courts, which tried Gröning and Henning. The courts did not consider this move as inconsistent with the doctrine of non-retroactivity and in fact did not address such issues in their judgments at all because they were still using the same Code, which has been in effect throughout the whole period before, during and after the Nazi regime.

Should this new approach be confirmed by the higher courts, it may become a rather powerful and effective instrument for dealing historical justice (though this justice may also be questioned from other perspectives – see *infra*).

On the other hand, it must also be borne in mind that this recent jurisprudence covers only the crimes, which occurred in the extermination camps (or mixed camps, where mass killing took place regularly). In Demjanjuk the court expressed itself that: “*The three extermination camps Treblinka, Belzec, Sobibór served only to one purpose; the mass murdering of the European Jewry. In this way any activity of the defendant as well as of any other camp guard was a contribution to the final purpose of the extermination camp, irrelevant if on the ramp [...], during forcing the inmates through the “Schlauch” to gas chambers, [...] during guarding of working units, which maintained the camp in good condition [...].*” (Demjanjuk judgment, Sec. D (I) (2)) However, it may be held that such conclusions would not be applicable automatically to camps, which were not predominantly used for mass extermination of people. Moreover, the premisses delimited in Demjanjuk and other cases would not be automatically applicable to crimes, which were perpetrated outside of the camps. Such cases would still require strong evidence to succeed and most likely would have to succeed according to the traditional pre-Demjanjuk jurisprudence of the German courts.

Conclusions: Too little, too late?

⁶¹ Media and commentators even point out to the fact that Demjanjuk was both a victim (as a Soviet POW) and a perpetrator (as a guard) of crimes during the WW II. (Engelhart, pp. 29-33)

Over the years there have been some 14.000 court proceedings in the Federal Republic of Germany against people potentially implicated in the Nazi crimes, leading to some 6.500 convictions.⁶² Taking into account the number of Nazi personnel involved in the operation of extermination and concentration camps and in crimes perpetrated by the army etc., it still does not seem to be an astonishingly high number.

Indeed, many of the perpetrators were tried and sentenced also by other than German courts, many apparently perished during the war and in the POW camps in Soviet Union, and many went successfully into hiding and escaped to foreign countries.

In any case, Germany has been struggling over the years to punish the perpetrators of crimes equal to those enshrined in the international criminal law. Besides possible political, sociological and moral considerations, which are predominantly outside of the scope of this article, it may be held that the topic of statutory limitation of crimes under the German Criminal Code has been the key element in this struggle. Due to the fact that except for the crime of murder all other relevant crimes were barred by statutory limitation (even if they amounted to crimes against humanity or war crimes but were lacking the “murder-element”), Germany was unable (unwilling) to cope with the mass crimes in their full complexity.

The prosecutors and the Central Office in Ludwigsburg were forced to mount a charge against the Nazi criminals by reference to their accessory to murder. All other crimes, such as looting of Jewish property, forced resettlement policies, torture etc. could have been prosecuted only as long as the prosecution was able to demonstrate a significant link to a case of a murder. Even in such cases persons often avoided significant sentence as they were deemed to be too distant accessors to the murder. (Kohout, in Krzan, 2016, p. 225-254)

Now, when it may seem that Germany finally found a way to tackle the legislative imperfections of its domestic criminal law vis-a-vis the Nazi criminals, there is yet one more problem. While the German public prosecutor's offices and the Central Office appear to have hastened their activity in the last drive for punishment of the remaining Nazi perpetrators (although most probably only of the “small cogs”), there is still no judgment of a higher court on the doctrine applied by the LG Munich in the Demjanjuk case, by the LG Lüneburg in the Gröning case and most recently by the LG Detmold in Henning's case. The Gröning judgment was issued already in July 2015, however, after the appeal (petition for revision) the judgment of the BGH in Karlsruhe is still awaited; despite the fact that according to the statistics of the BGH it takes on average up to half a year to issue the judgement on the appeal.⁶³ And as Oskar Gröning is already 95 years old, these prolongations present a potential thread that the defendant may pass away before the final judgment by the BGH. This would replicate the outcome of the Demjanjuk case and leave the prosecutors without substantial case-law of the higher courts. The labor of the prosecutors may be in such case futile.

These considerations were voiced also by the current Director of the Central Office in Ludwigsburg J. Rommel, who points out: *“We hope that the BGH decides soon and we will not have to go through the same situation like in the case of Sobibor guard John Demjanjuk, who died while the revision was still pending. A decision by the BGH would be helpful, because it could define, what the conditions are for one's co-responsibility for mass crimes in a camp: How the extermination process must have looked like, so that we may make culpable also those, who contributed only in a minor way. [...] Maybe we are going to be wiser after the Gröning decision, how far we could stretch the circle of the perpetrators and accessors.”*⁶⁴

⁶² See the statistics given in the Information Sheet produced by the Central Office in Ludwigsburg, available online at: http://www.zentrale-stelle.de/pb/site/jum2/get/documents/jum1/JuM/Zentrale%20Stelle%20Ludwigsburg/InformationsblattZSt_De13-en.pdf.

⁶³ See http://www.bundesgerichtshof.de/SharedDocs/Downloads/DE/Service/StatistikStraf/jahresstatistikStrafsenate2015.pdf?__blob=publicationFile, p. 5.

⁶⁴ Cited according to <http://www.spiegel.de/panorama/justiz/nazi-fahnder-rommel-warum-die-suche-nach-ns-taetern-weitergeht-a-1106885.html>.

The situation concerning Demjanjuk, Gröning, Henning and possibly other remaining camp personnel on the row for having their cases opened before the courts gives rise to other questions as well. In many respects these questions transcend the scope of this paper, however, they should be introduced at least in a shortcut.

Notwithstanding the fact that the path chosen originally by the German Federal Republic for the prosecution of Nazi perpetrators was most obviously a wrong and insufficient one (neglecting the emerging international criminal law), is the sudden switch in the judicial approach justified at such a late stage?

First of all, the cases dealt with by the German judiciary until the Demjanjuk judgment has to be now considered as *res iudicatae*. Such cases may not be re-opened. This produces inequality in the approach not only to the defendants on trial before and after Demjanjuk but also between the victims, who are often present at the trials in the position of joint plaintiffs. The defendants in the pre-Demjanjuk cases could have effectively shielded themselves by allegations that they used to be involved in the administration of the camps; however, they had nothing in common with the actual process of killing of victims. The recent cases, which were opened or which are being prepared⁶⁵ are usually aimed at such low ranking members of camps' personnel, who, had the previous jurisprudence of German courts not changed recently, would most likely avoid any punishment. Therefore - are such trials of Demjanjuk, Gröning, Henning and those, who may still follow, serving justice?

The new approach of the German courts rotates around the orbit of the crime of murder (§ 211 of the Criminal Code). As the above citation of J. Rommel illustrates, it is really conceivable that every person in the extermination camp had contributed to the killings, even if he was serving in the camp's kitchen. On the other hand, there is yet no convincing indication as to how far the prosecutors may stretch the chain of the culpable persons. A line needs to be drawn by the German courts in order to achieve consistence but also to avoid application of the principle of collective guilt.

Taken from a different perspective, this new doctrine could partially mend the former injustices within the German legal system towards the inchoate punishment of the Nazis. Gröning perhaps never killed any inmate with his own hands, perhaps never saw the gas chamber from a close distance; however, he was absolutely directly involved in looting of Jewish property. The German law, in contrast to international criminal law, was unable to provide punishment for such activities in time (as such crimes were simply covered by prescription). By making him implicated in the murder (yes, we can accept that, if we stretch the chain of accessors far enough), brings such persons as Gröning within the sights of justice in the historical sense.

We should also point out that the discussed issue will slowly become completely obsolete or of a purely historical nature. Due to the age of the surviving former camp guards it is highly unlikely that we would have many more trials to come. It is identically improbable that any of the potentially convicted persons would be marched to jail to serve his sentence there despite being over 90 years old. And although the persons are convicted to being accessory to murder in multiple thousand cases, the sentences are very minor anyway (a few years of imprisonment).

H. Arendt questioned after Adolf Eichmann's trial and his execution with a tip of bitterness: "*What good does it do?*" "She answered to herself that time: "*There is but one possible answer: It will do justice.*" (Arendt, p. 254)

Eichmann was, in fact, so much more implicated in the murdering of European Jewry than any person, who could possibly still stand for the trial in Germany these days. However, the quote has an absolute relevance for the present case as well. It reflects a trial as a tool not only for distributing the punishment but also as a tool for reconciliation. The most recent case-law in Germany is definitely not a bad one, in fact, its rationale is very convincing. Its problem can be seen in the historical perspective, since it produces imbalances between the past and the recent cases. The recent cases should not be show trials anymore as there have been many bigger and more relevant trials following the end of the WW II. But they should be trials, which are covered in media etc.

⁶⁵ See <http://www.zentrale-stelle.de/pb/,Lde/Startseite/Arbeitsweise/Schwerpunkte>.

It was summarized by J. Schuster, the President of the Central Council of Jews in Germany /*Zentralrat der Juden in Deutschland*/, when he reflected on the conviction of Gröning: “*Oskar Gröning was found guilty. The omissions of the German justice, which had prolonged or forestalled such trials for tens of years, cannot be remedied any more. Despite this the conviction of Gröning has a high meaning for all the victims and their relatives. And at least he accepted moral complicity.*”⁶⁶

In the view of the author of this paper this justice may show signs of deficiencies but it is still justice. Very late *Justice*, version 2.011.⁶⁷

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⁶⁶ See <http://www.zentralratdjuden.de/de/article/5321.schuster-verurteilung-grönings-war-wichtig.html?sstr=gröning>.

⁶⁷ I.e. the year of Demjanjuk's verdict announced by LG München.

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